Supreme Court of the United States

OCTOBER TERM, 1925.

No. 317.

CHARLES HAMMER,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONER.

ROBERT H. ELDER,
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PETITIONER'S BRIEF.

The Case Below.

This cause below, when in the District Court, is reported as *United States* v. *Hammer* (299 Fed. 1011); when in the Circuit Court of Appeals (Second Circuit) it is reported as *Hammer* v. *United States* (6 Fed. [2d.] 786).

Jurisdiction of This Court.

This case is a criminal cause and comes here by writ of certiorari to the Circuit Court of Appeals, granted April 13, 1925 (R. 75; *Hammer* v. *United States*, 267 U. S. 591) (Jud. Code, §§ 128, 240).

Statement of the Case.

Petitioner, Hammer, was indicted in the United States District Court for the Southern District of New York

of subornation of perjury (R. 1-10). There were three counts to the indictment. At the end of the government's case the court directed a verdict for defendant on the first and third counts (R. 36-37). The remaining count (R. 4-7) alleged, in brief, that Annie Hammer was adjudicated a bankrupt and the proceeding sent to a referee; that Hammer suborned Trinz to appear before the referee and to be sworn and, contrary to his oath, to state material matter which neither Trinz nor Hammer believed to be true; that Trinz did appear before the referee and was sworn; that it became material to inquire whether Trinz had loaned money to the bankrupt and whether the bankrupt had given him a note; that Trinz, in consequence of the subornation, swore that he had loaned the bankrupt money and had received from her a note, whereas the truth was otherwise, as both Trinz and Hammer knew.

At the trial the government called the referee (Thayer) who testified that Trinz was sworn, and testified before him (R. 12-17). There was read into evidence (the presence of the stenographer had been waived [R. 11]) the stenographer's transcript of the testimony of Trinz from which it appeared that Trinz had testified before the referee that he had loaned money to the bankrupt and had received a note from her (R. 18-19). The government then called Trinz. Trinz testified that he did not loan the bankrupt anything (R. 26-27). He mentioned a conference at which defendant was present during which there was talk about Trinz becoming a witness before the referee. After much coaxing, a great deal of leading, and some threatening (R. 29-31) the prosecutor succeeded in getting Trinz to say, "I was just to go up to the referee in Yonkers and testify, and state that I did not know exactly, or something, but money was loaned to me and so forth, or her, I did loan money to her * * * I was told not to worry and to state that I did not know when

the money was loaned to Mrs. Hammer by me, and I did not know it particularly * * *. Well, in general he said I was to say I gave money at various times and I did not know exactly the date and so forth" (R. 32).

At the conclusion of the case defendant raised the points (1) that a false oath in *bankruptcy* is not *perjury*, but a *distinct* offense, and therefore subornation of a false oath in bankruptcy cannot be subornation of *perjury*, and (2) there was *no proof* that Trinz's oath before the referee in bankruptcy was *false* except the testimony of Trinz himself, and the law requires such falsity to be proved by something *more* than a single witness. The points were raised by motions for a directed verdict, to dismiss the indictment (R. 37-38), by request for instructions (R. 45-46) and in arrest of judgment (R. 46-47) and severally denied over exception.

Specification of Assigned Errors Intended to be Urged.

We rely upon these assignments of error:

No. 12 (R. 60), viz., that the court erred in refusing to direct a verdict at the end of the government's case.

Nos. 13 and 15 (R. 60), viz., that the court erred in refusing to direct a verdict at the end of the whole case.

No. 14 (R. 60), viz., that the court erred in refusing to dismiss the indictment.

No. 18, (R. 62), viz., that the court erred in instructing the jury that they might convict although the testimony of Trinz which defendant was accused of having suborned was shown to be false by Trinz's uncorroborated testimony alone.

BRIEF OF THE ARGUMENT.

I.

The prosecution was for subornation of perjury. The taking of a false oath in bankruptcy is not perjury, but a different offense. There cannot be subornation of perjury without *perjury*. From this it follows that (a) the indictment does not state a crime, since it appears on the face thereof that the false oath stated to have been suborned was taken in bankruptcy, hence the court erred in denying the motions to dismiss the bill and to arrest judgment upon it; and (b) the evidence does not prove subornation of perjury, since the false oath alleged to be suborned was proved to have been taken in bankruptcy, hence the court erred in denying defendant's motion to direct a verdict.

Motion to dismiss indictment at end of government's case and exception, R. 37-38.

Motion to dismiss indictment at end of whole case and exception, R. 38.

Errors assigned (No. 14), R. 60.

Motion in arrest of judgment and exception, R. 46-47.

Error assigned (No. 22), R. 63.

Motion to direct verdict at end of government's case and exception, R. 37-38.

Motion to direct verdict at end of whole case and exception, R. 38.

Errors assigned (Nos. 12, 13, 15), R. 60.

The point was brought to the court's attention by counsel for defendant at the end of the government's case in this manner:

> "Now, if your Honor please, I move that your Honor direct a verdict of not guilty and also move that your Honor dismiss this indictment on the ground that it appears without dispute in the evidence that this alleged false swearing occurred in a proceeding in bankruptcy, and that that is not perjury under the United States statutes. It might be a violation of Section 29 of the Bankruptcy Act, but that is not perjury, and that therefore, for false swearing in a bankruptcy proceeding there can be no prosecution for perjury. There is no such crime as subornation of perjury based upon false swearing in violation of Section 29 of the Bankruptcy Act" (R. 37-38).

Theory of This Point.

The perjury statute was the earlier act. It is a general act. The later special Bankruptcy Act defines the offense of taking a false oath in bankruptcy and prescribes the punishment for it, which differs from the punishment for perjury; it prescribes a period within which prosecutions for the offense may be begun, which is not the same period which limits prosecutions for perjury; it indicates in other ways that when the bankruptcy law was enacted it was the intention of Congress to create a new offense, and not to define a new way in which the existing offense of perjury might be committed. Therefore Trinz, by taking a false oath in bankruptcy, did not commit *perjury*. And if Trinz was not guilty of *perjury* defendant could not have been guilty of *subornation of perjury*.

EXPOSITION.

If Trinz did not commit *perjury*, defendant could not have committed subornation of perjury.

Epstein v. *U. S.*, 196 Fed. 354, 356.
U. S. v. *Wilcox*, 4 Blatch 393.
Rex v. *Hinton*, 3 Mod. 122, 87 Reprint 78.
People v. *Teal*, 196 N. Y. 372, 376.
Hawkins, Pleas of the Crown, bk. 1, ch. 69, § 10.
1 *Russell, Law of Crimes* (7th ed.) 527.

"There being false swearings which are not perjuries, a procuring of their commission is not subornation of perjury" (2 *Bishop New Crim. Law*, § 1197-a).

Is it *perjury* to swear falsely in *bankruptcy?*

The distinction between perjury and false oaths not amounting to perjury goes back to antiquity. At common law a material false oath taken in a judicial proceeding was perjury; other false oaths, if in a matter of public concern, were punishable, but were not *perjury*.

2 *Bishop New Crim. Law*, § 1014.
1 *Russell, Law of Crimes* (7th ed.) 528-529.
30 *Cyc.* 1400-1401.

Congress not unfrequently has defined instances where false oaths are punishable, but *not* as *perjury*, e. g.:

Crim. Code, § 80 (naturalization).
36 *Stat.* 117, par. Eighth (corp. excise tax).
36 *Stat.* 1015, ch. 200 (national parks).
38 *Stat.* 771, par. F (income tax).
39 *Stat.* 775, §18 (income tax).
40 *Stat.* 441, §200 (2) (military service affidavit).

Let us now compare the perjury statute with the bankruptcy act, and interpret them.

The perjury statute is Crim. Code, §125 (35 Stat. 1111). It reads:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

The statute for false oaths in bankruptcy is Bankruptcy Act, § 29-b (30 Stat. 554). It reads:

> "*A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently* (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) *made a false oath or account in, or in relation to, any proceeding in bankruptcy;* (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

The perjury statute is the older. It was in effect as R. S. 5392 when the Bankruptcy Act was enacted. Thus we have an earlier general act, followed by a later special act, each act comprising a definition of an offense and pre-

scribing a penalty for it. The rule of interpretation in such a case is that the later special act removes such offenses as are covered by it from the operation of the earlier general act.

> *U. S.* v. *Tynen*, 11 Wall. 88, 95.
> *Lewis' Sutherland on Statutory Construction*, pp. 480-481.

So far as two statutes cover the same ground, the later must be deemed to have superseded (and so repealed) the former, because

> "the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and * * * the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law" (*Lewis' Sutherland on Statutory Construction*, p 481).

Then, too, the later act (Bankruptcy Act) fixes the lesser penalty, and

> "in construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty" (*U. S.* v. *Yuginovich*, 256 U. S. 450, 463).

It may not be speaking with precision to refer to the Bankruptcy Act as having *pro tanto* "repealed" the perjury statute, because at the time the later statute was enacted the perjury statute did not cover false oaths in bankruptcy proceedings for the good reason that there were no bankruptcy proceedings—there had not been a bankruptcy act in effect since 1878 (20 Stat. 99, repealing Bankruptcy Act of 1867 [14 Stat. 517]). But the same principle of inter-

pretation applies. It indicates a legislative purpose to create a new offense, and not to create a new species of the existing crime of perjury.

The *language* chosen also indicates such purpose. The word *perjury* is not used in the bankruptcy act. On the other hand, it says that a person shall suffer a stated punishment "upon conviction of *the* offense of having knowingly and fraudulently

(1) concealed while a bankrupt * * *
(2) made a false oath or account * * *
(3) presented under oath any false claim * * *
(4) received any material amount or property from the bankrupt * * *
(5) extorted or attempted to extort any money or property * * *."

Thus the draughtsman considered these five varieties of misconduct in bankruptcy as different forms of one general offense. We cannot suppose that he intended to make one variety of "*the* offense" so defined identical with the crime interdicted by R. S. 5392 (now Crim. Code § 125), viz., perjury.

Looking at the section as a whole, we see that the purpose was to create a scheme, complete in itself, without requiring reference to any other statute for the punishment of every kind of misconduct in bankruptcy. The scheme was to create three offenses.

Subdivision (a) defines "the offense" which can be committed by a trustee. That subdivision reads:

> "A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee."

Subdivision (b), which we have already quoted, defines "the offense" which may be committed by a person neither trustee nor referee.

Subdivision (c) defines "the offense" which may be committed by a referee (and in one instance by a trustee). That subdivision reads:

> "A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do."

This view gains further support by subdivision (d) of the section, wherein is defined the period of limitation. The language there chosen is:

> "A person shall not be prosecuted for any offense *arising under this act* unless the indictment is found or the information is filed in court within one year after the commission of the offense."

Which shows that the draughtsman considered false swearing in bankruptcy as an offense *arising* under the Bankruptcy Act, and not one arising under the statute defining perjury.

Other differences indicate that the offenses are distinct.

First, the penalties are different, the punishment for perjury being imprisonment for not more than *five* years *plus* a fine of not more than $2,000, and the punishment for a false oath in bankruptcy being not more than *two* years *without* any fine.

Second, the periods of limitation are different. Perjury may be prosecuted within *three* years (R. S. 1044). False swearing in bankruptcy must be prosecuted within *one* year (Bankruptcy Act, § 29-d).

Third, *materiality* is essential to perjury. It is not an element of the offense defined by the Bankruptcy Act.

Criticism of the Opinion Below.

The Circuit Court of Appeals referred to its earlier decision in *Wechsler* v. *U. S.* (158 Fed. 579). This decision, the court said, "is still the law of this Circuit and we adhere to it and believe it to have been properly decided" (R. 70). In the *Wechsler* case, the argument is as follows:

> "It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of either of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter which he did not believe to be true. When a person states matter which he does not believe to be true 'wilfully and contrary to his oath,' he may certainly be said to make a false oath 'knowingly and fraudulently.' We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the cita-

> tion of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty" (pp. 580-581).

The rule of construction which the court applied might have been correct if the Bankruptcy Act, by reference or otherwise, indicated that the *definition* of the offense for which it was prescribing a special punishment was to be found in the perjury statute. But the Bankruptcy Act does no such thing. It is complete in itself. It both defines and punishes.

If the reasoning of the court below were correct, if the Bankruptcy Act defined punishment only, then if Crim. Code § 125 should be repealed, one who made a false oath in bankruptcy could not be prosecuted at all, notwithstanding the continuance of the Bankruptcy Act saying:

> "A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently * * * made a false oath in * * * any proceeding in bankruptcy."

Can this be so? Can there be any doubt that false oaths in bankruptcy could be prosecuted under § 29-b no matter what happened to Crim. Code § 125? Because definition and punishment are both there. And if a false oath in bankruptcy can be prosecuted independently of the perjury statute, then such an oath is not *perjury*.

Other Decisions in Point.

(a) *Second Circuit.* Two decisions, *Kahn* v. *U. S.* (214 Fed. 54) and *Schonfeld* v. *U. S.* (277 Fed. 934) seem inconsistent with the decision below. In the *Kahn* case the court said:

> "It is said, however, that their falsity [of the statements assigned as perjury] was not shown by the clear and convincing proof necessary in perjury cases, which the defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special provision of the Bankruptcy Act making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and fraudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed, there was on our statute books, and had been for over a hundred years, a general perjury statute (now sec. 125 of the Criminal Code * * *) which provides that a person found guilty under its provisions 'shall be fined not more than two thousand dollars and imprisoned not more than five years.'
>
> If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for sec. 29b (2) at all? The fact that the word *perjury* [sic] does not appear in the later act and that the term of imprisonment was reduced from five years to two years and the $2,000 fine omitted altogether, makes it clear that Congress in the Bankruptcy Act was dealing with a crime not in its judgment so aggravated as the crime of perjury" (p. 56).

In the opinion below the court referred to this language as "some unguarded expressions" (R. 70).

In the *Schonfeld* case the court said:

> "False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing" (pp. 938-939).

The opinion below does not refer to this decision.

In *Epstein* v. *U. S.* (271 Fed. 282) the same court had before it a conviction for perjury, the oath having been taken in a bankruptcy proceeding, but this point was neither raised nor considered.

(b) *Sixth Circuit.* In *Ulmer* v. *U. S.* (219 Fed. 641) the Circuit Court of Appeals for the Sixth Circuit said:

> "If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial * * *; but the prosecution cannot be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *U. S.*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, § 29b (2), so as to charge that Ulmer 'made a false oath in and in relation to a proceeding in bankruptcy.' We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution

as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than two years specified in section 29b was unauthorized" (pp. 647-648).

(c) *Seventh Circuit.* In *Epstein* v. *U. S.* (196 Fed. 354) the Circuit Court of Appeals for the Seventh Circuit said:

> "In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is exactly as if there were only one section denouncing and punishing perjury, as follows:
>
> 'Whoever, having taken an oath * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years; Provided, that if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years' " (pp. 356-357).

This argument ignores the omission of the word "perjury" in the Bankruptcy Act, it ignores the context of section 29 of that act, which throws much light upon subdivision b (2), it ignores the fact that the Bankruptcy Act denounces and punishes *all* oaths whether material or not. The proviso in the court's hypothetical statute, when compared word for word with § 29-b (2) of the Bankruptcy Act, shows no resemblance whatever. Yet, if Congress had

intended to effect the result contended for, language similar to that used in the court's imaginary act would have been so natural, so certain to come to mind, that the use of very different language is most significant.

II.

If a false oath in bankruptcy can be prosecuted as perjury, then the rules of evidence governing perjury prosecutions apply. One of these rules is that the falsity of the oath cannot be proved by the uncorroborated testimony of a single witness. Here the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz, saying that what he swore to before the referee was not true. Moreover, the district judge charged the jury that it was not necessary for them to find corroboration on this issue. The Circuit Court of Appeals held that this rule of evidence does not apply to prosecutions for *subornation* of perjury. The distinction is erroneous.

How the Point Arose.

Trinz testified before the referee that he loaned the bankrupt money (R. 18-19). This is the false oath alleged to have been suborned (R. 6-7). On this trial, Trinz testified that he did not loan the bankrupt money (R. 23). There was not a suggestion of corroboration.

At the end of the government's case defendant's counsel moved for a directed verdict

> "on the ground that this is an indictment for subornation of perjury, and there is the testimony of but one witness here in which it is alleged the perjury arose. The law requires that there should be the testimony of one direct witness with corroborating circumstances, and that there are no corroborating circumstances" (R. 32).

The motion was denied (R. 38). Defendant rested and renewed the motion (R. 38). It was denied over exception.

Errors assigned (Nos. 12, 13, 15), R. 60.

Counsel then requested an instruction as follows:

> "Mr. Elder: I request your Honor to charge the jury that this crime charged being subornation of perjury, that they cannot find the defendant guilty upon the testimony of Trinz uncorroborated or independent of facts and circumstances which tend to show that the testimony which he gave or says he gave before Referee Thayer was false.
>
> * * * * * * *
>
> "The Court: An accomplice need not be corroborated.
>
> Mr. Elder: It is not a question of an accomplice. I except to that. I do not want, your Honor, to be misunderstood in this. This is not a question of an accomplice. It is the old common law rule, that in perjury and subornation of perjury, the testimony of one witness that the alleged subject matter of the perjury was false is not sufficient. The old rule was that there had to be two direct witnesses to the falsity of testimony. That has been modified by modern decisions, and now they say there has to be one direct witness to the falsity of the testimony and corroborative circumstances which tend to support it.

Now I request your Honor to charge that unless there be such independent corroborative circumstances in this case, then the jury must find the defendant not guilty.

The Court: We are agreed, but you (the jury) are not to understand, gentlemen, that the court charges you that there is no such independent corroborating testimony in this case.

Mr. Elder: I take exception to the qualification of your Honor.

* * * * * * *

Mr. Wolff: I ask your Honor to charge the jury the law does not require that there be corroboration of the testimony of Trinz. That if they believe what Trinz said to be the truth that is sufficient.

The Court: There you are squarely apart.

Mr. Elder: Yes, sir.

The Court: Very well; the motion of the government is granted; you have a clear exception to that part of it, Mr. Elder.

Mr. Elder: Thank you" (R. 45-46).

Error assigned (No. 18), R. 62.

The instruction first given was erroneous, coupled as it was with the statement that the jury might find corroboration where there was clearly none, but, as the Circuit Court of Appeals well said (R. 69), this was withdrawn by his subsequent instruction at the request of Mr. Wolff (Assistant United States Attorney) that no corroboration was required. So the point was squarely raised.

Theory of This Point.

The rule that in prosecution for perjury the falsity of the oath must be shown by something better than the uncorroborated testimony of a single witness arises out of the theory that when there is "oath against oath" and nothing more, the case is not proved. The rule applies to prosecutions for subornation of perjury, because perjury and

subornation of perjury are really the same offense, and, anyhow, when there is a single witness there is "oath against oath," no matter what *name* the offense on trial be given. All of the decisions are to this effect, excepting those in Missouri, which were not, we believe, well decided.

EXPOSITION.

Prosecution for either perjury or subornation of perjury requires proof that a particular oath was false. When that oath is controverted by the oath of a single witness and nothing more, then there is "oath against oath," which is the theory behind the rule. So no matter whether the prosecution be against the suborner or against the witness himself it must traverse ground where the "two witness rule" in perjury, so called, holds sway.

Thus, the *raison d'être* of the rule, viz., "oath against oath," indicates the extent of its application and becomes important. That "oath against oath" is the essential principle of it is seen clearly from a brief review of its history.

In early times an oath, like ordeal or wager of battle, was regarded as efficacious *per se* (4 *Wigmore on Ev.*, § 2932). This notion must not be dismissed as primitive. It persists to this day. It is at the basis of our hearsay rule; it explains the many exceptions to that rule which arise out of the principle that some circumstances give declarations trustworthiness equal, or nearly so, to an oath, such as dying declarations in homicide cases, spontaneous declarations following an accident or injury (usually referred to as *res gestae*), declarations against financial interest, etc. The same notion persists in our theory that uncontradicted testimony must ordinarily be accepted as true.

Quong Ting v. *U. S.*, 140 U. S. 417, 420.
Second National Bank v. *Weston*, 172 N. Y. 250, 258.
People v. *Davis*, 269 Ill. 256, 270-271.

The two witness rule of the ecclesiastical courts, fortified as it was believed to be by scripture, was equally a rule of the early common law (*Thayer, Preliminary Treatise on Ev.*, p. 87, citing *Mirror*, lib. 5, ch. 1, § 136), but it did not prevail in *practice* in the common law courts because the jurors of those days were primarily witnesses, and, being witnesses, they could return a verdict without any outside testimony at all. The two necessary witnesses were always present among the jurors themselves (4 *Wigmore on Ev.*, § 2032).

Now perjury was not originally a common law offense. It was deemed a sin rather than a crime (3 *Stephen, Crim. Law of Eng.* 243) and as such was first attempted to be punished by the ecclesiastical courts (*Ibid;* 2 *Pollock & Maitland, Hist. Eng. Law* 541). It was first dealt with as a crime by the Court of Star Chamber. That court, because the statute conferring its most important jurisdiction upon it (3 *Hen. VII*, ch. 1 [1487]) referred to the "increase of murders, robberies, perjuries," and authorized Star Chamber to call before it "the said misdoers," proceeded to punish perjury (3 *Stephen, Crim. Law of Eng.* 244-247). Star Chamber was presided over by the Chancellor, and proceedings before him were conducted in accordance with the rules of the ecclesiastical or civil law, and particularly the rule of two witnesses obtained therein (4 *Wigmore on Ev.*, § 2040).

The common law courts did not entertain prosecution for perjury until Star Chamber was abolished and its jurisdiction conferred on Kings Bench in 1640 (16 Car. 1, ch. 10). And when the common law judges began to apply the law of perjury, it was natural that they should apply it as they found it, including the rule that two witnesses were necessary to convict. And this rule did not disappear in the thought that the necessary witnesses could be found among the jurors, because by this time the orig-

inal function of jurors as witnesses had been abandoned. But for the continuance of the rule the common law judges found an additional reason of their own. It was this: In ordinary cases the defendant was not competent to testify. Therefore if there was but one witness there was his testimony against nothing, and a case was made out. But in a perjury case the defendant's oath (the one asserted to be false) necessarily was put in evidence, and hence if there was but one witness to the falsity of that oath there was "oath against oath" and so no case was made out (4 *Wigmore on Ev.*, § 2040). Thus:

> "Parker, C. J., in summing up the evidence said, *inter alia*, there is a difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore a credible and proper witness shall turn the scales in favor of either party; but in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be strong and clear evidence, and more numerous than the evidence given for the defendant; for else *there is only oath against oath*" (*Reg.* v. *Muscot*, 10 Mod. 192, 194, 195, 88 Reprint 689, 690).

Whatever may be the importance of the history of the rule, certain it is that it remains law to this day and that the *oath against oath* theory continues as its support.

> 4 *Wigmore on Ev.*, §§ 2040-2041.
> *U. S.* v. *Wood*, 14 Pet. 430, 438-439.
> *U. S.* v. *Hall*, 44 Fed. (D. C.) 864, 868.
> *Hashagen* v *U. S.*, 169 Fed. (C. C. A., 8) 396, 399.
> *Clayton* v. *U. S.* 284 Fed. (C. C. A., 4) 537, 540.

Modern decisions permit the falsity of the oath to be proved by circumstantial evidence, or by public records, or by writings emanating from the defendant himself (*U. S.* v. *Wood*, 14 Pet. 430, 440; *People* v. *Doody*, 172 N. Y. 165, 172; *State* v. *Wilhelm*, 114 Kan. 349), since these methods do not involve the balancing of one oath against another, but where falsity is sought to be shown by direct testimony it is firmly settled in American law that something more than the oath of a single witness is required. Appended hereto is a list of the most recent decisions which we have been able to find in each American jurisdiction where anything has been written on the subject. They show that the "oath against oath" principle still prevails.

Some writers, such as Wigmore, criticize the rule as being "anomolous," while conceding that practical results, founded in experience, may justify its continuance (4 *Wigmore on Ev.* [2nd ed.], § 2041). This is a case where practical reasons are strong. There is no testimony but that of Trinz, who voluntarily testified one way before the referee, and then under pressure testified the other way on the trial below. So we have in evidence his two contradictory oaths, and nothing more. It has always been the rule that when contradictory oaths of one person are proved something more is required to get at the truth, because as Tindal, C. J., said, "If you merely prove the two contradictory statements on oath and leave it there *non constat*, which statement is the true one?" (*Regina* v. *Hughes*, 1. Car. & K. 519, 527).

To the same effect see:

People v. *Glass*, 191 App. Div. 483.
People v. *McClintock*, 191 Mich. 589, 600-601.
State v. *Burns*, 120 So. Car. 523.
Schwartz v. *Commonwealth*, 27 Gratt (Va.) 1025.

The Circuit Court of Appeals did not question this rule so far as prosecution for *perjury* is concerned. They held it does not apply to prosecution for *subornation of perjury*. We shall now examine that distinction.

At common law perjury was a misdemeanor, and all parties to misdemeanors were principals, and were not classified as principals and accessories. The suborner of perjury was an accessory before the fact to the perjury; therefore he was a principal in the commission of the perjury itself. Hence the distinction between perjury and subornation of perjury was at best only nominal.

> "* * * perjury perpetrated by procuring another to do it [although] * * * honored in our law by the separate name of *subornation of perjury*, it is, in fact, *mere perjury*" (2 *Bishop, New Crim. Law*, § 1056).
>
> "The offense [subornation of perjury] is in substance the same as counselling or procuring the commission of the misdemeanor of perjury, and is punishable in the same manner as the principal offense under section 8 of the Accessories & Act 1861* (1 Russell, Law of Crimes [7th ed.], 527)."

Even where there is a statute separately defining subornation of perjury the suborner may be prosecuted for the perjury itself.

> *Commonwealth* v. *Smith*, 93 Mass. (11 Allen) 243, 256-257.

So, under the statutes of the United States, since the punishment of subornation of perjury, so called, is the same as for perjury (Crim. Code, § 126), and since the distinction between principals and accessories is abolished (Crim. Code, §332) there can be no doubt that the suborner could be indicted and punished for the perjury itself.

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* An act but declaratory of the common law (1 *Russell, Law of Crimes* [7th ed.], 138).

Since their offenses are identical, the perjurer and the suborner may be indicted and tried together.

> *Commonwealth* v. *Devine*, 155 Mass. 224, 226.
> 1 *Russell, Law of Crimes* (7th ed.) 527.
> 30 *Cyc.* 1440.

Therefore it would be strange, it would be illogical, particularly if they were indicted and tried together, if the suborner could be convicted on less evidence than is required for the perjurer. And certainly as against either the oath alleged to be false would have to be proved and if there were but a single witness saying it was false there would be "oath against oath" so that a case would not be made out. On principle, therefore, there can be no reason for asserting that this rule of evidence applies against the perjurer but does not apply against the suborner. Neither do the decisions make any difference.

Authorities in Harmony With This View.

English Law.

We have been unable to find any reported case in which the point was raised, but the English law is in harmony with the theory of this brief as is shown by the Perjury Act of 1911, which was intended to *codify* existing law.* It provides (§ 13):

> "A person shall not be liable to be convicted of any offense against this Act, or of any offense declared by any other Act to be perjury, or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

* 1 and 2 Geo. V, ch. 6. It is entitled "An Act to consolidate and simplify the law relating to perjury and kindred offenses."

AMERICAN LAW.

The Supreme Judicial Court of Massachusetts has held in accordance with this view (*Commonwealth* v. *Douglass*, 46 Mass. [5 Metc.] 241). They said:

> "The defendant's counsel contends that the whole charge must be proved, either by two witnesses, or by one witness and by other independent evidence corroborative of his testimony. *It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named;* and in this respect no objection is made to the instructions of the court to the jury, and as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of said crime, we think it very clear that the same rule of evidence does not apply" (p. 243).

In passing let us note what was pointed out by the Massachusetts Court. A prosecution for perjury involves two things. First, the fact that *perjury* was committed. That involves "oath against oath" and the two-witness rule applies. Second, the act of *subornation*. That does not involve "oath against oath," because proof that defendant *induced* the testimony is not inconsistent with that testimony, whatever it may have been. Hence, as to the act of *subornation* a single witness suffices. We believe, as we shall point out later, that the learned court below misread the decisions upon which they relied which say that the "subornation" can be proved by a single witness. They misinterpreted the *word*, thinking "subornation" connotes the entire crime of "subornation of perjury," whereas it indicates only one element of it.

The Supreme Court of Georgia, in an opinion by Mr. Justice Lamar, reached the same conclusion (*Stone* v. *State*, 118 Ga. 705). He wrote:

> "The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did. State v. Renswick, 88 N. W. 22.* *It is, however, necessary to show that the person suborned did actually commit the crime of perjury, and as to that portion of the case the court properly charged that the general rule as to perjury would apply, and two witnesses, or one witness and corroborating circumstances, would be necessary to establish the fact of perjury.* Comm. v. Douglass, 5 Met. 241; 2 Roscoe's Cr. Ev. 1079, 864" (p. 717).

The Georgia Court of Appeals in *Bell* v. *State* (5 Ga. App. 701) reasserted the rule in excellent manner, viz.:

> "The crime of subornation of perjury consists of two essential elements—the commission of perjury by the person suborned, and wilfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. The code of this State, following the universal rule on the subject, prescribes the quantum of evidence required in proof of perjury. This rule is that to convict of this offense the fact of perjury must be established by the testimony of two witnesses, or by that of one witness and corroborating circumstances. Penal Code, § 991. Of course, this rule applies only to proof of the fact alleged to have been falsely sworn to, and not to other ingredients which constitute the offense, such as the act of swearing and the giving of the testimony assigned as perjury * * *" (p. 703).

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* 85 Minn. 19.

> "The second element of the offense of subornation of perjury, to wit, the fact of subornation, according to the Supreme Court in the case of *Stone* v. *State*, 118 Ga. 717 (45 S. E. 626, 98 Am. St. R. 145), stands on an entirely different footing. 'The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did.' *In other words, while the offense of perjury must be shown by two witnesses, or one witness and corroborating circumstances, the fact that the person was suborned to commit the offense of perjury is sufficiently shown by the testimony of the suborned witness*" (p. 704).

The Supreme Court of Kansas in *State* v. *Wilhelm* (114 Kan. 349, 357) cited and approved what was said by Mr. Justice Lamar in *State* v. *Stone, supra*, though the precise point was not involved because falsity was proved in that case *circumstantially*.

The Supreme Court of Iowa in *State* v. *Waddle* (100 Ia. 57) took the same view. That was a prosecution for *incitement* to commit perjury, i. e., it differed from a *subornation* case in that the perjury was *not* committed. They said:

> "It must be remembered, however, that in this case there is not one oath against another. Neither Lizzie Seadore nor any other person has ever made oath that Watts is the father of the child. If Lizzie Seadore had so sworn, by the procurement of the defendant, then the prosecution must have been under section 3937* *and the rule* [viz., the 'one witness' rule] *would apply, for there would be one oath against another*" (p. 60).

The Court of General Sessions of Delaware has ruled to the same effect.

State v. *Fahey*, 3 Pennew. 295.

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*Iowa Code of 1873, § 3937; Iowa Code of 1924, § 13166, defining "subornation of perjury."

The Supreme Court of Minnesota in *State* v. *Renswick* (85 Minn. 19, 20) reached the result for which we contend, though on a different ground; the theory of the decision being that the perjurer and the suborner are accomplices as to the false testimony and the Minnesota statute requires an accomplice to be corroborated.

The foregoing are *all* of the American decisions which we have been able to find (with two exceptions in Missouri, *contra*, which we shall discuss presently) which decide or assert *anything* on this point.

Authorities in Conflict With This View.

The doctrine peculiar to Missouri was announced in *State* v. *Richardson* (248 Mo. 563) a decision of the second division of the Supreme Court of that state. Examination of the opinion shows that a number of witnesses testified to facts indicating the oath to have been taken falsely (pp. 566-567), so that whatever was said on the point was *dictum*, and unfortunately the defendant filed no brief in the Supreme Court, nor was he represented by counsel.

This is the argument of the court:

> "Mr. Best, in his work on evidence, gives as a further reason for the rule, that it has a tendency to cause a witness to testify with less apprehension or fear, and that by reason of the rule 'little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice' [Best on Evidence, secs. 605, 606; 3 Wigmore on Ev., § 2041]. By what course of logic can these reasons be made to apply to the case of a suborner? Why should the rule as to him be different from that applied in cases of larceny, rape, or other criminal offenses? The presumption of his innocence certainly is of no greater weight than in the case of one accused of larceny or rape. There is no public policy reason why his conviction should be made more difficult than in the majority of other

> felonies. He is not convicted of an offense occurring while he is under oath and testifying. The offense that he commits is virtually consummated before the witness gives his testimony. He is not charged with the giving of false testimony. He does not commit his crime while performing any necessary function in the progress of a trial. Why then should his conviction require greater proof than in convicting for theft? We do not think it does. All of the authorities hold that a single witness, uncorroborated, can make sufficient proof of the suborning" (pp. 570-571).

The error of the learned court is this: The suborner's offense is not "virtually consummated before the witness gives his testimony." The court was mistaken in asserting that "He is not charged with the giving of false testimony." Perhaps he commits *some* offense "before the witness gives his testimony," because it is a misdemeanor at common law to *incite* another to commit an offense which does not happen to be committed (1 *Russell, Law of Crimes* [7th ed.] 203), and it may be such in Missouri, but, as the Supreme Court of Iowa pointed out (*State* v. *Waddle, supra*), such offense is *not* subornation of perjury. That offense is not committed until perjury is committed. Therefore, the suborner *is* charged with "the giving of false testimony"; at any rate, as the Georgia Court of Appeals said (*Bell* v. *State, supra*), "The guilt of both the suborned and the suborner must be proved on the trial of the latter." And when the guilt of the perjurer is being proved on the trial of the suborner, the "oath against oath" principle asserts itself. This principle, of course, is the reason for the rule. We do not understand that Mr. Best's theory that it permits a witness to testify more freely (which theory seems to have influenced the decision) really has anything to do with it.

The same court recently cited and followed *State* v. *Richardson* without making any new analysis of the merits (*State* v. *White*, 263 S. W. 192, 194).

A Criticism of the Opinion of the Circuit Court of Appeals.

The opinion of the learned Circuit Court of Appeals, although not doubting the "one witness" rule in perjury prosecutions overlooked, it seems, the reason supporting the rule. They seem to have regarded it as arising out of the theory that "the crime is so heinous as compared with other crimes that in order to convict it is necessary that there should be at least one witness and that he must be corroborated * * *" (R. 71). But the atrocity of the crime had nothing to do with it, as we have seen. It arose out of the "oath against oath" doctrine. Having overlooked that doctrine, it was easier for the learned court to fall into error.

The court attempted no independent analysis of the question. It quoted from four cases and three text books, basing its decision upon their authority. We shall now examine them.

The first case it quoted is *U. S.* v. *Thompson* (31 Fed. 331). But Judge Deady, in writing that opinion, did not have in mind this rule of evidence at all. That is shown by the headnote which *he* wrote, saying *nothing* about it. Not once in the opinion did he mention it. He discussed only the rule dealing with the sufficiency of the uncorroborated testimony of *accomplices*. He decided that the perjurer is not an accomplice of the suborner. Whether he decided that question properly is immaterial here, and was *obiter* there, because the court found "on the evidence of Shepered, *which is corroborated by that of the defendant at every turn*, it is clear that the former committed perjury" (p. 335). But whatever the court *said* was addressed to the *accomplice* rule, and not to the *perjury* rule.

The second case cited is *Boren* v. *U. S.* (144 Fed. 801) (R. 72). The point was not involved in that case either. The testimony of the witness as to the act of perjury was amply corroborated. The court said:

> "If corroboration of testimony of the witnesses in this case *as to their perjury* in making the oaths was necessary, we find corroboration in the evidence which is in the record" (pp. 805-806).

This makes it clearer that when the court used the words "subornation of perjury" in that portion of the opinion which the court below quotes it was thinking of the *act* of subornation; it was using the word in the same limited sense in which it is used in the Georgia and Massachusetts decisions quoted *supra*. This is plain from this sentence:

> "The reason of the rule in the form in which it is expressed does not apply to a case of subornation of perjury such as the present case for the reason that here the testimony does not consist of the oath of one person against that of another" (p. 805).

Proof of *subornation* does not involve "oath against oath," but proof of *falsity* does.

The third case cited is *Commonwealth* v. *Douglass* (46 Mass. [5 Mete.] 241) (R. 73), discussed above. We believe the court below misapprehended this language, though they quoted it:

> "It is admitted that such evidence is necessary to substantiate that part of the indictment *which alleges that the crime of perjury was committed* * * *" (p. 243).

The last case cited is *State* v. *Richardson* (248 Mo. 563) (R. 73-74) which we have already considered.

The court also quoted from Wigmore, Bishop and Cyc. (R. 72).

The quotation from Wigmore shows, we believe, that learned writer had in mind the *act* of subornation, not the whole offense, for his reason is

> "for the *act* of subornation does not involve the theory of oath against oath, and the perjury [i. e., the fact of *testifying*] may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution" (§ 2042).

Wigmore cites only *State* v. *Richardson, supra.*

The quotation from Bishop was not in the author's edition of that work, but was inserted by the editors of the ninth edition. It cites nothing but *State* v. *Richardson, supra,* and the quotation will be recognized as having been inspired by that decision.

The quotation from Cyc. refers to the *act* of subornation. This is shown by the cases cited, viz.: *State* v. *Waddle, Comm.* v. *Douglass, State* v. *Renswick, Boren* v. *U. S.* (all discussed above) and *U. S.* v. *Thompson* (also discussed) which is not in point.

To summarize: a careful search of all the authorities, both in England and in the United States, shows that every time the precise point involved has been considered the decision has been that the rule applies in subornation cases as well as in perjury cases—save for the two decisions in Missouri. The weight of decision is clearly against the holding below. Good reason is against it. The rule of proof ought not to depend on the *name* by which the offense is called. It is the *nature of the problem* which controls. And when that problem requires proof that an oath was *false*, the law requires something better than the oral testimony of a single witness.

III.

We do not believe this court should examine the record to determine whether the indictment states and the evidence shows a violation of Bankruptcy Act § 29-b (2) because the case was tried below as one for subornation of perjury. But anyhow, the conviction could not be sustained under the Bankruptcy Act, because the rule of evidence argued applies to false swearing under that act as well as to false swearing under the perjury statute.

The District Court ruled that the prosecution was under the perjury statute and not under the Bankruptcy Act (R. 44). The Circuit Court of Appeals held that the prosecution was under the perjury statute. This court will adhere to the theory below, and will not examine the record to see whether the result might be justified on some other theory.

U. S. v. *Staloff*, 260 U. S. 477, 481.
San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 96-97.
United Press v. *New York Press*, 35 App. Div. 444, aff'd 164 N. Y. 406.
3 *C. J.* 718, 723.
17 *C. J.* 203.

But even if the case could be regarded as under the Bankruptcy Act, the rule of evidence discussed in the preceding point would control and the exceptions taken be equally available. Proof of false swearing that does not amount to perjury involves "oath against oath," and there-

fore a prosecution for such false swearing cannot be sustained with a single uncorroborated witness.

Regina v. *Browning*, 3 Cox. C. C. 437, 438.
Aguierre v. *State*, 31 Tex. Cr. 517.
Commonwealth v. *Davis*, 92 Ky. 460, 462.

Dated, April 15, 1926.

Respectfully submitted,

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APPENDIX.

(The most recent decisions in the several American jurisdictions as to the sufficiency of a single uncorroborated witness to establish the falsity of the oath in perjury cases.)

Alabama—

Pressly v. *State* (1921), 18 Ala. App. 40, 42-43.

Arkansas—

Clower v. *State* (1922), 151 Ark. 359, 363-364.

California—

People v. *Follette* (1925), 240 Pac. (Cal. App.) 502, 512-513. (A statutory rule.)

Canal Zone—

Canal Zone v. *Kerr* (1913), 2 Canal Zone 262, 268.

Colorado—

Thompson v. *People* (1899), 26 Colo. 496.

Connecticut—

State v. *Campbell* (1918), 93 Conn. 3, 12.

Delaware—

Marvel v. *State* (1925), 313 Atl. (Del. Gen. Sess.) 317, 318. (Here the proof was by circumstantial evidence. The single witness rule was criticized and questioned.)

Florida—

Yarbrough v. *State* (1920), 79 Fla. 256, 264-265.

Georgia—

Mallard v. *State* (1916), 90 S. E. (Ga. App.) 1044.

Illinois—

People v. *Niles* (1920), 295 Ill. 525, 532.

Indiana—

Hann v. *State* (1916), 185 Ind. 56, 60-61.

Iowa—

State v. *Young* (1911), 153 Ia. 4, 7.

Kansas—

State v. *Wilhelm* (1923), 114 Kan. 349, 353.

Kentucky—

Day v. *Commonwealth* (1922), 195 Ky. 790, 793.

Louisiana—

State v. *Jean* (1890), 42 La. Ann. 946, 949-950.

Massachusetts—

Commonwealth v. *Bullard* (1875), 119 Mass. 317, 324.

Michigan—

People v. *Kennedy* (1922), 221 Mich. 1, 4.

Minnesota—

State v. *Storey* (1921), 148 Minn. 398, 400-403. (Here the proof was circumstantial. The single witness rule was criticized and questioned.)

Mississippi—

Johnson v. *State* (1920), 122 Miss. 16.

Missouri—

State v. *Hardiman* (1918), 277 Mo. 229, 233-234.

Montana—

State v. *Gibbs* (1890), 10 Mont. 213, 124-125.

Nebraska—

Gaudy v. *State* (1889), 27 Neb. 707, 734.

New Mexico—
Territory v. *Remuzon* (1886), 3 New Mex. 648, 651.

New York—
People v. *Henry* (1921), 196 App. Div. 177, 183.

North Carolina—
State v. *Hawkins* (1894), 115 No. Car. 712, 715.

Ohio—
Ruch v. *State* (1924), 111 Oh. St. 580, 589.

Oklahoma—
Wright v. *State* (1925), 236 Pac. (Okla. Ct. App.) 633, 636.

Pennsylvania—
Commonwealth v. *Rogo* (1919), 71 Pa. Super. 109, 115.

Philippine Islands—
People v. *Lozano* (1906), 7 Phil. Rep. 142, 143.

South Dakota—
State v. *Pratt* (1907), 21 So. Dak. 305, 311.

Texas—
Godby v. *State* (1921), 88 Tex. Cr. 360, 363. (A statutory rule.)

Washington—
State v. *Vane* (1919), 105 Wash. 170, 177.

West Virginia—
State v. *Miller* (1884), 24 West Va. 802, 805-806.